IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 503 OF 2006

WITH

CIVIL APPLICATION NO. 635 OF 2006

IN

NOTICE OF MOTION NO. 1315 OF 2006

IN

S.C. SUIT NO. 5551 OF 2005

M/S.BANDRA TRILOK CO-OP. HSG.
SOCIETY LTD. ... APPELLANTS

V/S

SHREE AHUJA PROPERTIES P. LTD. ..RESPONDENTS

MR. V.A. THORAS, SR. COUNSEL FOR APPELLANTS.
N.V. WALAWALKAR, SR. ADV. WITH V.P. SAWANT
WITH MR.ROCHIRAMANI FOR RESPONDENT.

CORAM : D.G. KARNIK, J.
DATE : 31-8-2006.

P.C.

1. Heard learned counsel for the parties. By

consent, heard finally at the stage of admission.

2. The property bearing CTS No. C-1651, C-1653 & C-1654 (part) admeasuring about 4049.16 square meters (hereinafter referred to as " total property") situate at 313, Dr. Ambedkar Road, Bandra (W), Mumbai 400 050, originally belonged to Mrs. Hardevi Rajpal (hereinafter referred to as "the owner"). In the year 1961 the owner agreed with M/s. United Building Corporation to let out the total property to them. The actual lease deed, however, was never executed. M/s. United Building Corporation (hereinafter referred to as the developers) developed part of the total property by constructing flats thereon, which were allotted to various flat purchasers who formed Bandra Trilok Co-op. Housing Society Ltd., the appellant herein. On account of the dispute between the owner and the developers the owner did not execute a lease deed in favour of the developers or in favour of the appellant society. A suit, bearing No. 3189 of 1981 was filed by the appellant against the owner. The Suit was settled and decreed as per the consent terms filed by the appellant - society and the owner. By clause No. 2 of the consent terms the owner agreed to execute a lease deed for the remainder of the term, i.e.

for 72 years, in favour of the appellant - society in respect of a part with the total property excluding a portion of 400 sq. metres. By the said consent decree the appellant - society agreed that the owner alone would have the possession of the portion marked "B" on the plan annexed, with right to construct residential flats, shops and garages thereon subject to the rules and regulations of the Bombay Municipal Corporation and subject to necessary sanction being obtained from the Bombay Municipal Corporation. By the said consent decree, the owner agreed to execute the lease deed in respect of the remaining property marked "A" on the plan annexed (hereinafter referred to as "the portion "A"). As the owner did not execute a lease deed in respect of the portion "A", as per the consent decree, the appellant - society filed an execution proceeding in the City Civil Court. On 13th February, 2003 the City Civil Court directed the owner to execute the sale deed in respect of the portion marked "A". The learned Counsel for the parties stated at the bar that the lease deed has not yet been executed as the draft of the lease deed has not been settled.

3. In the meanwhile by deed s of conveyance dated

11th August, 2005, the owner conveyed her right, title and interest in the total property in favour of Shree Ahuja Properties Pvt. Ltd. the respondent herein. The sale deed recites the history of the dispute between the appellant-society and the owner. The conveyance deed states that the purchaser, the respondent herein, could be entitled to recover the arrears of the rent of the "Portion -A" as mentioned in the consent decree from the appellant - society. The conveyance then states that the respondent would be entitled to occupy, possess and enjoy the property for their own use and benefit without any lawful eviction and interruption, subject, however, to the appellant’s right as the lessee of the portion "A".

4. According to the respondent symbolic possession of the "portion - A" and actual possession of the "portion - B" was delivered to it by the owner under the deed of conveyance dated 11th August 2005.Under the conveyance the respondent, as purchaser of the property, has acquired right to recover the rent of the property of "Portion - B" with right to construct the building thereon subject to the rules and regulations of the Bombay Municipal Corporation.

As the possession of the respondent was threatened by the appellant the respondent filed a Suit, being Suit No. 5551 of 2005, in the City Civil Court, Mumbai, for an injunction restraining the appellant from disturbing its possession of the "portion - B". In the said Suit, a motion was taken out by the respondent for interim injunction. By an order dated 9th June, 2006, the learned Judge of the City Civil Court granted interim relief of injunction restraining the appellant from disturbing possession of the respondent of "portion - B". That judgment is impugned in this appeal.

5. The appellant admits the original title of Hardevi Rajpal, the owner of the total property. Initially, there was no direct agreement entered into between the owner and the appellant. Initially the owner agreed to lease the total property to the developer, who constructed flats and sold them to the individual flat purchasers who form the appellant - Society. However, the owner refused to execute the lease deed in favour of the appellant society and a Suit was filed by the appellant - society against the owner, in the City Civil Court. Compromise arrived between the parties who filed the consent terms on 24th

September, 1982. Thus contractual relationship was created between the appellant and the respondent on 24th September, 1982. Under the consent terms the total property was divided into two parts, namely, the "portion - A" and "portion - B" marked on the plan annexed to the consent terms. The owner agreed to execute lease deed in respect of the "portion - A" in favour of the appellant for remainder of the term of 72 years. The appellant in turn, released its claim in respect of the "portion - B" and agreed that the owner alone would have the possession thereof as an owner without any interference of any nature whatsoever from the appellant. The appellant also agreed that the owner would have the right to construction the flats, shops and garages on the "portion - B" subject to the rules and regulations of the Bombay Municipal Corporation and subject to obtaining necessary sanction of the building plans. Paragraph No.2 and 3 of the consent terms which are relevant for the discussion read as follows :

> 2. The defendant will execute in favour of the plaintiffs within four months after the date of filing consent terms, a lease deed for 72 years period with an option to

the Society and/or its successors-in-title for further period of 99 (ninety nine) years in respect of the property bearing City Survey No. C/1651 (full), C/1653 (full) and C/1654 (part) as described in Para 1(i) of those consent terms and delineated by blue boundary line on the plan annexed hereto, less set back area.

3. The defendant will be entitled as owner to construct on the portion bearing city survey No. C/1654 (part) as delineated by red boundary line and marked as "B" on the plan annexed hereto and shall alone have possession as owner thereof without any interference of any nature whatsoever till such interference of any nature whatsoever till such construction is completed and sold on ownership basis and residential flats/shops/garages subject to the following:

(a) the said construction is in accordance with the rules and regulations of the Bombay Municipal Corporation, the town

Planning authorities and other appropriate authorities and the plan of such construction is duly sanctioned by the aforesaid authorities.

(b) The said construction will be subject to the plan, initially sanctioned or that may be got sanctioned by the defendant up to such height as may be so sanctioned. The defendants shall be further entitled to all benefits on account of land acquired for set back by BMC in respect of 'C' Block by the Bombay Municipal Corporation and/or the town Planning authorities and shall further be subject to the set back provided for by the Bombay Municipal Corporation Authorities and/or any other appropriate authorities.

(c) The defendant shall sell on ownership basis the said flats/shops/garages on the said

plot "B" on delineated by red boundary line on plan annexed hereto. The sale agreement alongwith other terms will include terms and recorded in a separate writing signed by the plaintiffs and the defendant.

(d) (i) The defendant shall be a member of plaintiff- Society in respect of her flats in Trilok ’C" Building so long as the flats are not sold/transferred to any other persons’ name as per the Bye-laws of the plaintiff society.

(ii) The occupants and/or Purchasers of flats/shops/garages in the Building constructed on Plot marked "B" on plan and delineated by red boundary line shall become members of plaintiff-society immediately after their occupation of flats/shops/garages and/or completion of the sale.

(e) The defendant shall within one year from the date of these Consent Terms get

vacated the tenament held by Mr. Johny Brotto family. The defendant will not, till she gets the said tenaments so vacated, employ the said Johny Brotto or any member of his family directly or indirectly. The defendant further, after she gets the said tenament vacated will not employ or otherwise... to the said Johny Brotto or any member of his family or any portion of the Society's property in any capacity whatsoever. The defendant, will, however, have the right to let out or on leave and licence the said flat/tenament on any portion of the same with the prior permission of the plaintiff- society in accordance with the Bye-laws of the society.

(f) The defendant will complete the construction as soon as practicable.

(g) The defendant will execute in favour of the plaintiffs lease for the remaining portion also that is to say, the portion referred to herein before shown in the plan annexed hereto delineated by a red boundary line on the plan and marked "B"

on completion of the construction and occupation and/or completion of sale of the flat/shops/garages referred to hereinabove.

(h) The defendant will pay to the mortgagee i.e. the plaintiffss in High Court Petition No. 716 of 1967 or their successors in title or otherwise satisfy their claim in full and obtain reconveyance back in favour of the defendant before/simultaneously at the time of execution of Lease and payment of Rs. 1,30,000/- (Rupees one lakh thirty thousand only) provided for in para 1(1), and a copy and/or the clearance certificate will be provided to the plaintiffs Society for record."

[Other clauses not being relevant for this appeal, are not reproduced]

6. Bare reading of clauses 2 and 3 make it clear that under the consent terms the owner recognized lawful possession of the appellant of the "portion -A" i.e. the total property , excluding "portion-B". the appellant in turn

recognized that the owner was in possession of "portion -B". the owner continued to be the owner of the total property subject to the condition that she has to execute lease deed in respect of the "portion - A" in favour of the appellant society for 72 years. The owner continued in possession of "portion -B" unencumbered by any lease. As an owner, Hardevi Rajpal had a right to sell and transfer her right, title and interest in the total property which she conveyed to the respondent by deed of conveyance, dated 11th August, 2005. the respondent thus acquired the owners right to receive the rent in respect of the "portion -A" and to own without any encumbrance and possess the portion - B". The respondent is, therefore, entitled to retain the possession of "portion - B" and the appellant is not entitled to disturb its possession.

7. For these reasons the learned Judge of the City Civil Court was right in granting injunction in favour of the respondent in respect of the "portion -B". No error can be found in the decision. The appeal is accordingly dismissed.

8. In view of the dismissal of the Appeal, the Civil Application does not survive and is also

dismissed.

9. At the request of learned counsel for the appellant ad interim order passed by this court on 28th July, 2006 shall remain in force for a period of 4 weeks.

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(D.G. KARNIK,J.)